KEOHANE V. FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY, 952 F.3D 1257 (11TH CIR. 2020): HOW THE ELEVENTH CIRCUIT COURT OF APPEALS STARTED WITH A CONCLUSION AND THEN MANIPULATED PRECEDENT TO DEAL A BLOW TO TRANSGENDER PRISONER'S RIGHTS

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I. INTRODUCTION

"If there is no struggle there is no progress."[1] Over the past decade, the transgender community has seen substantial progress in various aspects of American life. The Pentagon lifted the ban on transgender persons serving in the military.[2] Medicare discontinued a blanket ban on covering medical treatments related to gender dysphoria.[3] In the 2020 elections, six transgender candidates were elected to state offices, including the first ever transgender state senator.[4] That progress, however, is far from complete. One area where transgender persons continue to struggle is behind bars. While incarcerated, transgender inmates are forced to confront violence, housing issues, and a lack of access to proper medical care.

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1. Frederick Douglass, West India Emancipation (Aug. 3, 1857) (transcript at https://rbscp.lib.rochester.edu/4398).

2. Dave Philipps, *As Biden Lifts a Ban, Transgender People Get a Long-Sought Chance to Enlist*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/us/biden-transgender-ban-military.html.

3. Ariana Eunjung Cha, *Ban Lifted on Medicare Coverage for Sex Change Surgery*, WASH. POST (May 30, 2014), https://www.washingtonpost.com/national/health-science/ban-lifted-on-medicare-coverage-for-sex-change-surgery/2014/05/30/28bcd122-e818-11e3-a86b-362fd5443d19_story.html.

4. David Garcia & Piper McDaniel, *Trans and Nonbinary Candidates Set Record Wins in Red and Blue States*, NPR (Nov. 9, 2020, 06:42 PM), https://www.npr.org/2020/11/09/931819214/ trans-and-nonbinary-candidates-set-record-wins-in-red-and-blue-states.

For a brief moment, Reiyn Keohane, a transgender inmate, won a major victory for transgender inmates when a district court ruled that the Florida Department of Corrections (FDC) had to provide her with both hormone therapy and access to female clothing and grooming standards. That victory, however, was short-lived as the Eleventh Circuit Court of Appeals reversed and vacated the decision of the lower court. It was a blow felt by Keohane personally, and by everyone who had thought that progress was finally being realized in the area of medical treatment for transgender inmates.[5]

Part II of this Article will examine Reiyn Keohane's legal journey, gender dysphoria, and the legal history of mootness and inmate medical care under the Eighth Amendment. Part III will lay out in detail the opinion of the Eleventh Circuit. Finally, Part IV contains the author's critical analysis of the court's decision. This Part also examines the split in precedent among the circuits and argues that these issues should be taken up and reviewed by the Supreme Court.

II. HISTORY

Born in February of 1994, Reiyn Keohane never could have imagined she would find herself embroiled in a legal battle over the rights of transgender prison inmates.[6] Born a biological male, Keohane says that "she's always had an 'internal sense' of being female."[7] By the age of twelve, Keohane began identifying as a female.[8] At thirteen, she began treatment under the supervision of both a psychiatrist and therapist in order to address her identity issues.[9] Keohane socially transitioned at the age of fourteen and exclusively began wearing "female-typical" clothing, cosmetics, and hairstyles.[10] By eighteen, she had legally changed her name and was formally diagnosed with Gender Identity Disorder (GID).[11]

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5. *See* Rachel Badham, *Florida Rules to Prevent Trans Inmate from Receiving Gender-Affirming Clothing*, GSCENE (Dec. 9, 2020), https://www.gscene.com/news/florida-court-rules-to-prevent-trans-inmate-from-receiving-gender-affirming-clothing/ ("This setback comes during a period of national developments for trans inmates.").

6. *Inmate Population Information Detail*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=Y55036&TypeSearch=AI (last updated Feb. 27, 2022).

7. Keohane v. Jones, 328 F. Supp. 3d 1288, 1292 (N.D. Fla. 2018) (internal citation omitted).

8. Complaint at ¶ 26, *Jones*, 328 F. Supp. 3d 1288 (No. 4:16-CV-511).

9. *Id.* at ¶ 27.

10. *Id.*

11. *Id.* at ¶¶ 28–29.

At the time, the Diagnostic and Statistical Manual of Mental Disorders (DSM) Volume IV cataloged GID in the chapter on "sexual dysfunctions."[12] The updated version of the DSM (Volume V) changed the terminology from GID to Gender Dysphoria and cataloged it as a standalone chapter.[13] Gender dysphoria is now viewed as a clinical issue, defined by the following criteria:

> A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:
>
> 1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
>
> 2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
>
> 3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
>
> 4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
>
> 5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
>
> 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).[14]

To meet criteria for the diagnosis, the condition must also be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.[15]

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12. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (4th ed. 2000).
13. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).
14. *Id.* at 452–53.
15. *Id.*

The American Psychiatric Association clarifies that not every transgender person will experience gender dysphoria.[16] Those treated with an individualized treatment plan include: social affirmation (use of preferred pronouns and style of dress), legal affirmation (changing of legal name and gender on official documents), medical affirmation (use of hormones or hormone blockers), or surgical affirmation.[17] As part of her individualized treatment, in addition to social and legal affirmation, Keohane began hormone therapy in August of 2013 at the age of nineteen (prescribed and monitored by her endocrinologist).[18]

A. Arrest and Imprisonment

In September of 2013, less than two months after Keohane began her hormone treatment, she was arrested and charged with attempted murder after she stabbed her roommate.[19] She subsequently accepted a plea deal that sentenced her to fifteen years in prison.[20] With that choice, Keohane became one of the hundreds of transgender individuals incarcerated within the Florida prison system.[21]

The FDC classifies and houses inmates based on external genitalia.[22] This meant that Keohane was subject to male grooming and clothing regulations. Male inmates are required to wear "under shorts" at all times and keep "their hair cut short to medium uniform length at all times with no part of the ear or collar covered."[23] Keohane was not able to continue her social affirmation (specifically the wearing of a bra, panties, and long hair).[24]

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16. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited Feb. 25, 2022).

17. *Id.*

18. Complaint, *supra* note 8, at ¶ 30.

19. Carol Marbin Miller, *Transgender Inmate Challenging Florida Prison Laws Found Dead in Cell*, TAMPA BAY TIMES (Aug. 16, 2016), https://www.tampabay.com/news/publicsafety/transgender-inmate-who-filed-lawsuit-found-dead-in-cell/2289666/.

20. *Id.*

21. In March of 2020 the FDC stated that there were roughly 410 transgender individuals incarcerated in the state's prisons (with about 150 having a medical diagnosis of Gender Dysphoria). Kathryn Varn, *Misgendered and Mistreated in Jail: A Pinellas Transgender Woman Shares Her Story*, TAMPA BAY TIMES, https://www.tampabay.com/special-reports/2020/03/10/misgendered-and-mistreated-in-jail-a-pinellas-transgender-woman-shares-her-story/ (last updated Mar. 13, 2020).

22. Haley Lerner, *Two Transgender Women Arrested at Rights Rally Call Treatment at Miami Jail 'Dehumanizing,'* MIA. HERALD, https://www.miamiherald.com/article244822332.html (last updated Aug. 14, 2020) (quoting Miami-Dade Corrections and Rehabilitation Department spokesperson Juan Diasgranados, "[i]nmates with male genitals shall be assigned to male housing. Inmates with female genitals shall be assigned to female housing.").

23. FLA. ADMIN. CODE r. 33-602-101(2), 101(4) (2020).

24. *Id.*

In addition to the grooming standards, the FDC, at the time, had a policy that limited hormone treatment to the level that the inmate was receiving prior to incarceration (colloquially known as the "freeze frame" policy).[25] This directly affected Keohane, whose hormone treatment had been discontinued because she missed a scheduled appointment during her initial incarceration while the plea deal was being negotiated.[26]

Within a month of being incarcerated, Keohane began filing grievances, requesting that the FDC both resume her hormone treatment and allow her to follow female grooming and dress standards.[27] Her numerous requests and grievances were all denied over the course of two years.[28] One of the denials explicitly informed Keohane that she would "not be placed on hormonal therapy while incarcerated in the Florida State Dept. of Corrections."[29]

During this time, Keohane stated that the conformity to male standards and lack of hormonal treatment left her feeling "[e]xtremely depressed[,] . . . [s]uicidal[,] . . . [and] angry."[30] She reported attempts of suicide and self-castration.[31] Through this, the FDC remained steadfast in their denials.[32] After two years, Keohane retained an attorney and filed a federal lawsuit.[33]

The complaint requested the court declare the FDC was violating her Eighth Amendment right by denying her medically necessary treatment.[34] It also asked the court to enter permanent injunctions against the FDC—one that would direct them to allow her access to hormone treatment and social transitioning, and one that would enjoin them from enforcing their "freeze frame" policy.[35]

The FDC's response was two-fold. First, within a month of the lawsuit being filed, the FDC arranged for Keohane to be seen by an

25. Keohane v. Jones, 328 F. Supp. 3d 1288, 1301 (N.D. Fla. 2018).

26. Keohane's doctor had suspended her treatment because of a canceled appointment, citing that it would be dangerous to continue without proper supervision. Complaint, *supra* note 8, at ¶ 55. Keohane claims that the appointment was not canceled, but rather she missed it due to being incarcerated. *Id.* at ¶ 56.

27. *Jones*, 328 F. Supp. 3d at 1296.

28. *Id.*

29. *Id.*

30. *Id.* at 1297 n.6.

31. *Id.* at 1292.

32. *See id.* (referring to the FDC's response to Keohane's suicide and self-castration attempts, "[n]o matter though for Defendant. Even this deafening call for help didn't cause a reevaluation in the way it was treating Ms. Keohane.").

33. *Id.* at 1292 n.3 (naming Julie Jones in her capacity as the Secretary of the FDC).

34. Complaint, *supra* note 8, at ¶ 98.

35. *Id.*

outside endocrinologist and begin hormone treatment.[36] Second, it filed a motion to dismiss, claiming that the issue of hormone therapy was moot (because at that point Keohane had just been allowed to start taking hormones again) and that the request to follow female grooming standards failed to state a claim for relief under the Eighth Amendment.[37] The motion was defeated and both parties proceeded to trial.

B. A Brief History of Mootness

A moot case is a "matter in which a controversy no longer exists" or a "case that presents only an abstract question that does not arise from existing facts or rights."[38] From the beginning, American jurisprudence has precluded the courts from hearing moot cases (justiciability doctrine).[39] In 1964, the Supreme Court explicitly anchored this doctrine to the Constitution.[40]

It became clear to the early courts that defendants could use mootness to manipulate jurisdiction and avoid judicial review of their actions.[41] In response, the Court began carving out exceptions to the mootness doctrine. One of these exceptions is commonly referred to as the "voluntary cessation" exception. The Court established that a defendant's voluntary cessation of a challenged activity would not automatically moot a case.[42] Subsequent caselaw has established that the burden falls on the defendant to show "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to

36. *Jones*, 328 F. Supp. 3d at 1299.

37. Memorandum in Support of FDOC's Motion to Dismiss at 5–6, *Jones*, 328 F. Supp. 3d 1288 (No. 4:16-CV-511).

38. *Moot Case*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. *See, e.g.*, Mills v. Green, 159 U.S. 651, 653 (1895) ("The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and *not to give opinions upon moot questions* . . . .") (emphasis added).

40. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.").

41. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 309 (1897) ("The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow.").

42. *See* United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.").

recur."[43] The Court has consistently held that this standard is high and stringent.[44]

Relevant to the *Keohane* case, when a defendant asserts a mootness argument based on voluntary cessation of a challenged activity, the Eleventh Circuit Court of Appeals applies a non-exclusive three-prong test for determining whether there is a reasonable expectation that a challenged activity will recur.[45] The test looks at:

> (1) whether the termination of the offending conduct was unambiguous; (2) whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction; and (3) whether the government has "consistently applied" a new policy or adhered to a new course of conduct.[46]

No one factor is viewed as dispositive, and a finding of mootness will only occur if the "totality of [the] circumstances persuades the court that there is no reasonable expectation that the [defendant] will reenact" the challenged action or policy.[47]

C. A Brief History of the Eighth Amendment as It Relates to Inmate Medical Care

The shortest amendment in the Bill of Rights by word count states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[48] This statement was incorporated to the states via the Fourteenth Amendment.[49] Early jurisprudence saw the prohibition of cruel and unusual punishment not as something that was fixed to what "cruel and unusual" meant when the Bill of Rights was ratified, but rather as a progressive standard that evolves over time.[50]

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43. Friends of the Earth, Inc., v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

44. *See, e.g.*, *id.* at 170 ("[A] defendant claiming that its voluntary compliance moots a case bears a *formidable burden*.") (emphasis added); United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968) ("The test for mootness in cases such as this is a *stringent one*. Mere voluntary cessation of allegedly illegal conduct does not moot a case.") (emphasis added).

45. *See* Doe v. Wooten, 747 F.3d 1317, 1323 (11th Cir. 2014).

46. *Id.*

47. Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1257 (11th Cir. 2017) (en banc).

48. U.S. CONST. amend. VIII.

49. *See* Robinson v. California, 370 U.S. 660, 666 (1962).

50. *See* Weems v. United States, 217 U.S. 349, 378 (1910) ("The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.").

One example of this evolution came in 1976, when the Supreme Court held a government has an "obligation to provide medical care for those whom it is punishing by incarceration."[51] It was later clarified, through subsequent decisions, that this obligation did not require inmates to be completely comfortable.[52] It also did not require inmates receive the treatment of their choice,[53] or even that they receive good treatment.[54] A violation of the Eighth Amendment occurs when prison officials are shown to have a "deliberate indifference to [the] serious medical needs of prisoners."[55]

To demonstrate an Eighth Amendment violation has occurred, an inmate must satisfy both an objective and a subjective prong.[56] The objective prong relates to whether the inmate has a "serious medical need."[57] Under the subjective prong, the inmate "must prove that the prison official acted with deliberate indifference to that need."[58] To accomplish this, the inmate must establish, "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence" on the part of prison officials.[59] As a caveat to the subjective prong, a court may weigh any constitutional infringements against the need for prison officials to carry out "the central objective of prison administration, safeguarding institutional security."[60] A decision based on legitimate security concerns would, therefore, not amount to deliberate indifference.[61]

D. The Trial

Keohane's case made its way to a bench trial presided over by Judge Mark Walker of the Northern District Court of Florida.[62] After reviewing the evidence and hearing testimony from both sides, Judge Walker

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51. Estelle v. Gamble, 429 U.S. 97, 103 (1976).
52. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
53. Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991).
54. *See Estelle*, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").
55. *Id.* at 104.
56. Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004).
57. *Id.*
58. *Id.*
59. *Id.*
60. Bell v. Wolfish, 441 U.S. 520, 547 (1979). Later clarification provided that "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." Brown v. Plata, 563 U.S. 493, 511 (2011).
61. *See* Helling v. McKinney, 509 U.S. 25, 37 (1993) ("The inquiry into [the subjective] factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration.").
62. Keohane v. Jones, 328 F. Supp. 3d 1288 (N.D. Fla. 2018).

delivered his ruling in a sixty-one-page order.[63] In the order, the court permanently enjoined the FDC from ever reenacting their "freeze frame" policy.[64] A permanent injunction was also issued requiring the FDC to allow Keohane to continue with hormone treatment and socially transition (by allowing her access to female clothing and grooming standards).[65]

1. Keohane's Challenge to the FDC's "Freeze Frame" Policy Ruled Not Moot

The FDC argued the issues of the "freeze frame" policy and Keohane's previous denial of hormone therapy were moot because, at the time of trial, the Department had abandoned the policy and allowed Keohane to restart her hormone treatment regimen. The court rejected that argument and held the FDC did not establish "an unambiguous termination" of its policy.[66] The court based its finding on the timing of the change in policy,[67] the length of time the policy was in place,[68] the lack of evidence that the change in policy was based on any "substantial deliberation,"[69] the fact that at least one inmate was subject to the former policy after it had been revised,[70] and lastly that the FDC failed to promise that it would never re-enact the policy.[71] The court opined that all these factors add "to the tidal wave of . . . circumstances crashing down on Defendant's mootness argument."[72] After holding the claim was not moot, the court found the "freeze frame" policy amounted to an unconstitutional blanket ban on medical treatment.[73] It then entered injunctions that barred the FDC from re-enacting the policy and mandated Keohane continue to receive hormone treatment for as long as medically necessary.[74]

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63. Keohane v. Fla. Dep't. of Corr. Sec'y, 952 F.3d 1257, 1279 (11th Cir. 2020) (Wilson, J., dissenting).

64. *Jones*, 328 F. Supp. 3d at 1319.

65. *Id.*

66. *Id.* at 1300.

67. The court noted that the decision only came after the FDC "was staring down the barrel of a federal lawsuit." *Id.* at 1292.

68. Keohane had been consistently denied hormone treatment per the policy for over two years. *Id.* at 1300.

69. *Id.* at 1299 ("There are no minutes, memoranda, or testimony from any person knowledgeable about the change to show [the FDC] engaged in substantial deliberation in amending [the freeze frame] policy.").

70. *Id.*

71. *Id.* at 1300.

72. *Id.* at 1299.

73. *Id.* at 1302.

74. *Id.* at 1319.

2. Denial of Social Transitioning by the FDC Is Unconstitutional

In considering whether the FDC's denial of Keohane's social transitioning represented a violation of the Eighth Amendment, the court began by looking at the World Professional Association of Transgender Health's (WPATH) standards of care for treating gender dysphoria.[75] The court noted WPATH's standards of care include the use of social transitioning to treat gender dysphoria.[76] It also noted that the FDC, by way of Keohane's filed grievances and attempts at self-harm, had knowledge that this treatment was medically necessary.[77] With this, the court found that social transitioning was "medically necessary," and the FDC's denial of the treatment "constitute[d] deliberate indifference."[78] The court then rejected the FDC's argument that social transitioning represented a security risk, commenting that it was just one of many "red herring[s]" the FDC used in an effort to misdirect.[79]

Accordingly, the court entered a permanent injunction ordering the FDC to "permit Ms. Keohane access to . . . female clothing and grooming standards."[80] The court concluded by stating that: "Ms. Keohane is not an animal. She is a transgender woman. Forthwith, Defendant shall treat her with the dignity the Eighth Amendment commands."[81]

3. The Court's Additional Comments

In addition to the injunctions ordered by the court, the opinion included commentary on what the court deemed the real motivation behind the FDC's conduct. In dicta, Judge Walker opined that "[a] lot can explain the denial of care in this case, starting at the top with ignorance and bigotry."[82] He highlights throughout the opinion that FDC officials and witnesses are unfamiliar with both the treatment of gender

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75. The court noted that the WPATH standards of care are recognized by the American Medical Association, the American Psychiatric Association, as well as the American Psychological Association. *Id.* at 1294. Based on this, the court considered them "authoritative in the treatment of gender dysphoria." *Id.* The standards were introduced and advocated for by Keohane's expert witness. *Id.*

76. *Id.*

77. *Id.* at 1313.

78. *Id.* at 1318.

79. *Id.*

80. *Id.* at 1319.

81. *Id.* at 1318.

82. *Id.* at 1305.

dysphoria and with transgender individuals in general.[83] The opinion includes specific quotes from Dr. Whalen, the FDC's Chief Medical Officer, that the court classified as unenlightened.[84] All this contributed to the court commenting that "if Ms. Keohane's treatment in Defendant's custody is not deliberate indifference, then surely there is no such beast."[85]

III. KEOHANE V. FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY

In early 2020, the FDC challenged the ruling through an appeal before the Eleventh Circuit. What resulted was an eighteen-page decision followed by a twenty-two-page dissent that saw the majority and dissent trading barbs and responses to each other in the text and footnotes.[86] In the end, the court vacated all the orders of the district court, finding in favor of the FDC.[87]

A. On Mootness of the "Freeze Frame" Policy and Denial of Hormone Therapy

The court first looked at the challenge to the FDC's "freeze frame" policy. It noted because the FDC had rescinded the policy, the issue of mootness hinged on whether the voluntary cessation exception to mootness applied in the case.[88] It explained that while normally the defendant would bear the burden of demonstrating "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,"[89] the standard shifts for government defendants.[90]

83. *See, e.g.*, *id.* at 1306 n.10 ("Defendant's expert witness on prison security . . . was downright baffled over the differences between transgender people, gay people, and people diagnosed with gender dysphoria.").

84. *Id.* at 1306. The quotes included Dr. Whalen's reference to the American Medical Association and American Psychological Association as "basically political arms," *id*., as well as his comments that transitioning gender roles "goes against nature" and that sexual preference "is [a person's] choice." *Id.* 1306 n.11.

85. *Id.* at 1293.

86. *See, e.g.*, Keohane v. Fla. Dep't. of Corr. Sec'y, 952 F. 3d 1257, 1272 n.8 (11th Cir. 2020) ("We pause here to respond briefly (or perhaps not so briefly) to the dissent's extended critique. . . . The dissent accuses us—vigorously and repeatedly—of ignoring [precedent] . . . ."); *id.* at 1279 ("The majority cites language from my dissent to suggest that I have let the emotions surrounding this issue sway my opinion.") (Wilson, J., dissenting).

87. The court ultimately held that the challenges to the FDC's former "freeze frame" policy and initial refusal of hormone treatment were moot and that the FDC did not violate the Eighth Amendment by refusing to allow Keohane's social transitioning. *Id.* at 1279.

88. *Id.* at 1267.

89. *Id.* (internal citations omitted).

90. *Id.*

Government actors are afforded more leeway, and if the public defendant states a policy has been repealed, then the burden shifts to the plaintiff to present "affirmative evidence that [her] challenge is no longer moot."[91] To determine if the plaintiff has met this burden, the court stated it must look at "three broad factors" (while cautioning that no one factor should be dispositive and the factors are not exclusive).[92] The three factors are whether: (1) the change in conduct resulted from serious deliberation and not merely an attempt to manipulate jurisdiction; (2) the termination of the conduct was unambiguous ("permanent and complete"); and (3) the government actor consistently committed to the new policy.[93]

Analyzing the first factor, the court conceded it had no doubt the FDC was motivated in part by the filing of Keohane's lawsuit when it changed its policy and allowed her to begin hormone therapy.[94] However, it noted again that no one factor is dispositive in the overall analysis.[95] On the second factor, the court found the FDC's formal repeal of the "freeze frame" policy was plain and unambiguous.[96] It based this on the fact that the FDC formally removed the challenged policy as it applied to all inmates and not just Keohane specifically.[97] Further, it relied on the claim from the FDC that it would be difficult to reinstate the policy even if it wanted to.[98] This, in addition to the FDC's repeated assurances that "it has no intention of re-enacting" the policy, led the court to find Keohane failed her burden on this factor.[99] The court likewise felt Keohane did not meet her burden on the third factor.[100] The court viewed the FDC's commitment to the policy change as consistent, commenting that since the change the FDC "hasn't looked back."[101]

In summing up the three factors, the court placed little weight on the FDC's motivation for changing its policy; rather, it focused on

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91. *Id.* at 1267–68 (internal citations omitted).

92. *Id.* (citing Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248 (11th Cir. 2017)).

93. *Id.*

94. *Id.* at 1269.

95. *Id.* ("[E]ven if we were to give Keohane the substantial-deliberation factor, it is but one among several, and here the remaining considerations tip the scale decisively in the other direction.").

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1270.

101. *Id.* The court found the evidence of one inmate being denied hormone treatment based on the "freeze frame" policy after it had been repealed was not enough to "demonstrate inconsistency." *Id.*

evidence that it believed demonstrated the FDC would not "revert back to its old ways absent the injunction."[102] Accordingly, the court found Keohane's challenge to the former "freeze frame" policy moot and vacated the district court's injunction.[103]

The same rationale was used by the court in determining that the issue of the FDC formerly denying Keohane her hormone treatment was also moot (thus vacating the district court's injunction on that as well).[104] The court clearly stated that the two issues (the challenge to the policy and the individual challenge to the denial of hormone treatment) were completely separate.[105] Even so, the court found the same evidence sufficient to moot the policy claim equally sufficient to moot Keohane's hormone therapy claim.[106] Such evidence included the fact that Keohane, at the time of the appeal, had been receiving her hormone therapy for almost three and a half years.[107]

By holding that both the challenges to the policy and the hormone treatment were moot, the court did not have to rule on whether the policy or the denial of treatment were violations of the Eighth Amendment. The court did however comment, "Were we free to reach the merits, we would almost certainly agree, as well."[108]

B. On Denial of Social-Transitioning Being a Violation of the Eighth Amendment

The opinion stated the court reviewed the district court's ultimate determination that the denial of social transitioning constituted a violation of the Eight Amendment de novo and any subsidiary issues of fact "for clear error."[109] The opinion states the de novo review applies to all the components of the claim (both the subjective and objective) and a finding of clear error is not required to reverse the ultimate determination that an Eighth Amendment violation has occurred.[110] The majority supports this in a lengthy footnote, explaining that to require

102. *Id.*
103. *Id.*
104. *Id.* at 1279.
105. *Id.* at 1271.
106. *Id.* ("[T]he governing principles remain basically the same.").
107. *See id.*
108. *Id*. at 1266 (referring to the district court's holding that the policy and denial of treatment constituted a deliberate indifference to a serious medical need).
109. *Id.* at 1272.
110. *Id.* at 1272 n.8.

otherwise would limit the de novo review to a "mindless, mechanical box-checking assessment."[111]

The opinion begins by recognizing that both Keohane and the FDC agree the objective component has been met. The plaintiff (through counsel), the FDC, the district court, the majority, and the dissent were all in lockstep that "Keohane's gender dysphoria constitute[d] a serious medical need within the meaning of Eighth Amendment precedent."[112] Thus, the dispute centered on the subjective component.[113]

The opinion held that the FDC's conduct did not rise to the level of deliberate indifference; specifically, it did not rise above mere negligence.[114] The court cited two reasons for this conclusion. The first was the treatment that Keohane received was based upon an adequate medical determination.[115] The court found the medical determination that social transitioning was not medically necessary fell within the standards of decency required by the Eighth Amendment.[116] The court also found that at least part of the denial for social transitioning was based on "serious security concerns."[117] The court accepted the FDC's explanation that social transitioning (which would include female dress and grooming) would present a threat to both prisoner safety and institutional security. The opinion stated that security concerns "must be given significant weight" when evaluating medical care and deliberate indifference.[118]

Before concluding, the court's opinion addresses the claim (by the district court and the dissenting opinion) that the denial of social transitioning was based on a blanket policy rather than on an individual's medical needs.[119] The opinion conceded this was once the case but also noted that the FDC had rescinded that policy and "clarified that it [would] make exceptions for social-transitioning-related requests

111. *Id.*
112. *Id.* at 1273 (internal quotations omitted).
113. *Id.*
114. *Id.* at 1274.
115. *Id*. The court clarifies a medical disagreement over treatment does not support an Eighth Amendment violation. *Id.*
116. *Id.* at 1275. Specifically, the court found that the treatment provided by the FDC was not "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Id.* (internal citations omitted). The opinion backs up this contention by commenting on how "Keohane's symptoms improved," even though she was denied social transitioning. *Id.* at 1275 n.11.
117. *Id.* at 1275.
118. *Id*. (internal citations omitted).
119. *Id.* at 1275 n.11.

if deemed medically necessary."[120] The majority then summed up its decision:

> Bottom line: In light of the disagreement among the testifying professionals about the medical necessity of social transitioning to Keohane's treatment and the wide-ranging deference that we pay to prison administrators' determinations about institutional safety and security, we simply cannot say that the FDC consciously disregarded a risk of serious harm by conduct that was more than mere negligence and thereby violated the Eighth Amendment.[121]

With that, the court reversed the lower court's ruling that Keohane's Eighth Amendment rights had been violated and vacated the injunction requiring the FDC to allow Keohane to socially transition.[122]

C. Petition for Certiorari Denied

A petition for a rehearing *en banc* was filed, and the decision denying that rehearing came down in December of 2020. The opinion opened with a statement authored by Chief Judge William Pryor giving his opinion that *en banc* hearings are disfavored and should be rare.[123] Then Circuit Judge Newsom (author of the *Keohane* opinion) delivered his concurrence. He began by addressing the dissent's criticism of his opinion, which he characterized as "[s]trong words. Not a one of them true."[124] He then offered to "turn down the volume and provide a little perspective" before delivering the court's opinion to deny the rehearing.[125] He concluded with, "[w]hile the dissental's spicy rhetoric doesn't enhance its argument—but rather pretty severely diminishes it, to my mind—it does, I fear, erode the collegiality that has historically characterized this great Court. Here's hoping for better—and more charitable—days ahead."[126]

The "spicy rhetoric" referenced by the opinion included Circuit Judge Rosenbaum referring to the *Keohane* opinion as a rogue threat to

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120. *Id.*
121. *Id.* at 1277.
122. *Id.* at 1279.
123. Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 995 (11th Cir. 2020) ("The decision to grant en banc review is always discretionary and disfavored.").
124. *Id.* at 997.
125. *Id.* at 997, 1002.
126. *Keohane*, 981 F.3d at 1003. The term "dissental" as used by the court is "the increasingly popular term for an opinion dissenting from a rehearing en banc, with its opposing opinion known as a concurral." RR, *The Power of "Dissentals*,*"* CONST. L. PROF BLOG (Sept. 04, 2012), https://lawprofessors.typepad.com/conlaw/2012/09/the-power-of-dissentals-.html.

"the stability and predictability of the law."[127] Judge Rosenbaum was joined in her dissent by three judges on the circuit. The dissent's main contention was that in *Keohane*, the court imposed the incorrect standard of review during the determination of the deliberate indifference claim. The dissent stated the *Keohane* opinion "created a new rule diametrically opposed to [prior precedent]"[128] and thus violated the prior-precedent rule. The dissent asserted that this type of violation "demands en banc review."[129]

IV. CRITICAL ANALYSIS

The critical nature of the analysis to follow cannot be understated. But before beginning, a few positive things need to be noted. Credit should be given to both the majority and dissent for their consistent use of Keohane's preferred gender pronouns (she/her). One might think that this would be a given these days, but that is not the case.[130] Second, the fact that the opinion did not feel the need to weigh any facts in determining whether gender dysphoria constitutes a serious medical need (instead merely stating it as matter of fact) is also indicative of progress.[131]

A. On the Issue of Mootness

Even though mootness is not a flashy issue when compared to the fiery debate over inmate social transitioning, the court's evaluation of the issue should not get lost in the shuffle. The majority gave little deference to the district court's holding but great deference to the FDC as a government entity, both facts raise serious concerns.

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127. *Id.* at 1013 (Rosenbaum, J., dissenting).
128. *Id.* at 1007 (Rosenbaum, J., dissenting).
129. *Id.* at 1013 (Rosenbaum, J., dissenting).
130. *See, e.g.*, Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) ("Gibson was born male. But as *his* brief explains, *he* has been diagnosed as having a medical condition known today as 'gender dysphoria' or 'Gender Identity Disorder' GID. *He* has lived as a female since the age of 15 and calls *himself* Vanessa Lynn Gibson.") (emphasis added).
131. *See generally* Maggert v. Hanks, 131 F. 3d 670, 672 (7th Cir. 1997) ("Gender dysphoria is not, at least not yet, generally considered a severe enough condition to warrant expensive treatment at the expense of others than the person suffering from it."). Additional comments from that opinion serve to further illustrate how different views were less than twenty-five years ago. *See id.* ("We do not want transsexuals committing crimes because it is the only route to obtaining a cure.").

1. Specific Analysis of the Opinion: Deference? . . . The Eleventh Circuit Isn't Giving Any

In reaching its holding that the challenges to the FDC's "freeze frame" policy and to the denial of hormone treatment were not moot, the district court reviewed documents, listened to testimony, and heard legal arguments from both sides. Judge Walker ruled after making comprehensive factual findings based on the evidence provided at trial. If the appropriate amount of deference to these findings was afforded by the court, then they would have been binding unless they were found to be clearly erroneous. But that is not what happened here.

Instead, the majority embarked on a justification of why it felt that the issues were moot—the opinion reads more like a lower court's ruling than an appellate review. There are only sparse references to the district court's findings in the court's opinion.[132]

The majority followed prior precedent in reviewing the district court's mootness holding de novo.[133] However, it does not seem prudent to completely disregard the value judgment of someone with primary knowledge of the factual concerns.[134] In this case, Judge Walker looked into the metaphorical eyes of the FDC and determined that they were not to be trusted at face value.

2. Specific Analysis of the Opinion: The Eleventh Circuit Was Misguided in Its Finding of Mootness, Leaving the FDC Open to Reenact Unconstitutional Policy

As noted, the test for if the voluntary cessation of a policy will moot a claim involves three factors. Stripped of all legalese, the test is a set of scales. On one side of the scale is evidence that tends to establish that the challenged behavior or policy will not recur.[135] On the other side is evidence that tends to raise doubt about a defendant's commitment to never reenact the behavior or policy.[136] Because the factors of the test

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132. This observation is not lost on the dissent. *See Keohane*, 952 at 1284 ("But rather than lend due weight to the district court's findings, the majority commandeers the district court's role, ignoring that court's conclusions while focusing on the facts it likes better.") (Wilson, J., dissenting).

133. Troiano v. Supervisor of Elections, 382 F. 3d 1276, 1282 (11th Cir. 2004).

134. *See* Hiram Walker & Sons, Inc., v. Kirk Line, 30 F.3d 1370, 1376 (11th Cir. 1994) (noting that the district court has a distinct advantage over an appeals court based on "observing the witnesses and evaluating their credibility firsthand") (internal citations omitted).

135. During the analysis this side of the scale will be referred to as the mootness side of the scale for simplicity and clarity.

136. During the analysis this side of the scale will be referred to as the exception side of the scale for simplicity and clarity.

are non-exclusive and no one factor is determinate, anything can be placed on the scales and be given any weight that the ultimate decider chooses. In Keohane's situation, after weighing all the pertinent information, there seems to be no conceivable way that the scales tip in the favor of mootness. That is, unless a finger is pushing down on them in order to attain a desired result.

The first thing to get placed on the exception scale is the timing of the FDC's voluntary cessation of the "freeze frame" policy.[137] The fact that the FDC stood by the policy for so long and only made a change after a legal suit was initiated points more towards manipulation of jurisdiction than an actual belief that the policy was wrong. The opinion, while conceding that point, did not think that it should be "overemphasized."[138] Common sense and real-life experience tend to contradict this. Someone who consistently engages in wrongful behavior over a long period of time then stops when caught would be hard-pressed to find people who trust that their newfound change in behavior was genuine; Eleventh Circuit precedent even says as much.[139]

Further casting doubt on the FDC's sincerity is the fact that it has never offered up a plausible motivation for why it made the policy change (information necessary to refute the contention that the move was purely an attempt to manipulate the court system). The opinion acknowledged that the motivation behind a policy change was a factor to be considered, but then never actually cites to any motivating factor on the FDC's part other than jurisdiction manipulation.[140] Instead, the majority casually mentions that "even if we were to give Keohane the substantial-deliberation factor, it is but one among several, and here the remaining considerations tip the scale decisively in the other direction."[141]

The remaining considerations alluded to by the court were the fact that the FDC had given its word to never return to the policy, and that

137. The analysis will refer only to the "freeze frame" policy, as the denial of hormone treatment was tied to that policy and ultimately involves the same analysis as far as mootness goes. *See* Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1271 (11th Cir. 2010) ("[E]ven though here we consider the FDC's freestanding determination to provide Keohane hormone therapy—independent of its later repeal of the freeze-frame policy . . . the governing principles remain basically the same.").

138. *Id.* at 1269.

139. *See* Harrell v. Fla. Bar, 608 F.3d 1241, 1266 (11th Cir. 2010) ("As for timing, a defendant's cessation before receiving notice of a legal challenge weighs in favor of mootness, while cessation that occurs late in the game will make a court more skeptical of voluntary changes that have been made.").

140. *See Keohane*, 952 F.3d at 1269 ("We don't doubt for a minute that the FDC's about-face just two months after Keohane filed suit was motivated . . . by a desire to rid itself of this litigation.").

141. *Id.*

since giving that word, there has only been scarce evidence that it was not sincere. The FDC giving its word should hardly be given much weight.[142] By definition, mootness requires a defendant showing, at a bare minimum, that he or she will not return to the challenged behavior or policy. However, this is a double-edged sword. The 30,000-foot view of the FDC's argument is that the court should vacate the injunction of the "freeze frame" policy and declare the issue moot because it is committed to never using the policy again. If the FDC were truly committed, then it would not be bothered by being enjoined from employing a policy that it claims it never would use again. It would drop the issue and not spend money and time appealing it. Also, the fact that the "freeze frame" policy has been used since the FDC "abandoned" it also raises doubts.[143] The opinion states that one instance of a broken promise does not rise to the level of a "pattern" that would concern them.[144] But it certainly is evidence that should be placed firmly on the exception scale.

Lastly, a factor not discussed by the opinion that bears weight in this analysis is public opinion. Certainly an agency like the FDC would be more likely to return to a challenged policy that was supported by public opinion than one that did not receive such support.[145] In the area of transgender inmate care, there is strong evidence that public opinion is not on the side of providing transgender prisoners with treatments such as hormone therapy.[146] There is a definite risk that the FDC could be emboldened by public opinion to reinstate the "freeze frame" policy,[147]

142. Without question though, it goes onto the mootness side of the scale.

143. The dissent supplies an apt analogy. *See Keohane*, 952 F.3d at 1284 (Wilson, J., dissenting) ("Like canaries in a coal mine, these deviations warn that the FDC is not as dedicated to its new positions as the majority would have us believe.").

144*.* *Id.* at 1270.

145. Members of the Supreme Court certainly recognize this danger. *See, e.g.*, Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 122 (2015) (Thomas, J., concurring) ("The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law.").

146*. See, e.g.*, Margie Fishman, *Trans Inmate First to Begin Hormones in Prison*, DEL. ONLINE, https://www.delawareonline.com/story/life/2016/05/27/transgender-inmate-first-begin-hormones-delaware-prison/83831252/ (last updated May 28, 2016) ("[P]risons have faced public backlash for offering taxpayer-backed hormone treatments to transgender prisoners, especially for those who waited until after they were locked up to seek medical advice.").

147. Inmate medical care is a layered issue. One of those layers is the quality of healthcare for citizens not incarcerated. *See* EJ Montini, *Why Prison Inmates May Get Better Health Care than You*, AZ CENT (Feb. 18, 2015, 04:25 PM MST), https://www.azcentral.com/story/ejmontini/2015/02/18/aclu-prison-health-care-arizona-lawsuit/23614995/ ("Still, it's outrageous that a convicted criminal should have it better than a regular, law-abiding citizen."). To be sure, as non-inmates continue to struggle to have access to adequate healthcare, the cries for limiting inmate healthcare will only grow louder.

especially since it "hasn't admitted that its practices violated the Constitution."[148]

In the end, all the majority needed was a promise from the FDC. The opinion weighted that promise so heavily that it overcame everything else. This was due in main part to the fact that the FDC is a governmental agency.[149] A review of the evidence, however, reveals that this trust is misplaced and that the FDC did not demonstrate an unambiguous termination of its "freeze frame" policy. The scales clearly tip in favor of finding that the claims were not moot.

The opinion's incorrect finding of mootness leaves the FDC free to police itself; a power that it has already proven to be incapable of wielding without violating the constitutional rights of inmates. In the meantime, transgender inmates in Florida are left waiting—wondering if they will wake up the next day to the reenactment of the "freeze frame" policy.

3. Trust the Government?

Mistrust of the government has deep roots in this country. The constitutional system itself was designed around the concept. Drafter James Madison explained:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself.[150]

Centuries of American governance have not served to diminish this sentiment.[151] Despite this, the Eleventh Circuit continues to follow precedent that lowers the bar for government defendants in overcoming

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148. *Keohane*, 952 F.3d at 1269.

149. *See infra* pt. IV(A)(3) (discussing how Eleventh Circuit precedent is to give deference to governmental defendants in mootness cases).

150. THE FEDERALIST NO. 51 (James Madison). More modern political philosophers agree as well. *See, e.g.*, PUBLIC ENEMY, FIGHT THE POWER (Motown Records 1989) ("We've got to fight the powers that be.").

151. *See Americans' Views on Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/ ("Just 20% of U.S. adults say they trust the government in Washington to 'do the right thing' just about always or most of the time.").

the voluntary cessation exception to the mootness doctrine.[152] It is not alone—a majority of circuits afford a lower standard to governmental actors.[153]

The problem is that this lower standard does not come from the Supreme Court. In fact, it runs counter to Supreme Court precedent on voluntary cessation claims involving government defendants. The Supreme Court has consistently held government defendants to the same high standard that it does private defendants.[154] The Eleventh Circuit attempts to navigate around this fact in two ways: by isolating Supreme Court cases where a government defendant successfully mooted a claim, and then by attributing those government victories to some lower standard sanctioned by the Court.[155] The *Keohane* majority declaring that "the Supreme Court has held almost uniformly that voluntary cessation by a government actor moots the claim"[156] is not an accurate representation of Supreme Court precedent.[157] The circuit courts' deviation from these high standards creates a risk of serious injury.[158] When the circuit courts lower the bar and allow government

152. *See Keohane*, 952 F.3d at 1267–68 ("[G]overnment entities . . . have . . . considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities," and "government actors are more likely to honor a professed commitment to changed ways.") (internal citations omitted).

153. In addition to the Eleventh Circuit, at least five other circuits grant this leeway. *See* Speech First Inc. v. Schlissel, 939 F.3d 756, 767 (6th Cir. 2019) ("Although the bar is high for when voluntary cessation by a private party will moot a claim, the burden in showing mootness is lower when it is the government."); *see also* Magnuson v. City of Hickory, 933 F.2d 562, 565 (7th Cir. 1991); Prison Legal News v. Fed. Bureau of Prisons, 944 F.3d 868, 881 (10th Cir. 2019); Sossamon v. Texas, 560 F.3d 316, 325 (5th Cir. 2009); Marcavage v. Nat'l Park Serv., 666 F.3d 856, 861 (3d Cir. 2012).

154. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (rejecting the city's mootness argument even after the city voluntarily repealed its policy because "[t]here is no *certainty* that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction") (emphasis added); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007) (rejecting the district's mootness argument based on there being a "*heavy burden* that Seattle has clearly not met") (emphasis added); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 n.1 (2017) ("The Department has not carried the *heavy burden* of making *absolutely clear* that it could not revert back to its policy.") (internal citations omitted) (emphasis added).

155. *See Keohane*, 952 F.3d at 1268.

156. *Id.* (quoting Beta Upsilon Chi Upsilon Chapter v. Machen, 586 F.3d 908, 917 (11th Cir. 2009)).

157. If one follows the string citations all the way through, they end at three Supreme Court decisions. In contrast to the claim that a government defendant must only voluntarily discontinue an activity to moot a claim, each of the cases cited involved government policies that were changed by the legislative repeal of the laws. *See* Diffenderfer v. Cent. Baptist Church of Mia., Fla., Inc., 404 U.S. 412, 414 (1972); *see also* Kremens v. Bartley, 431 U.S. 119, 130 (1977); Lewis v. Cont'l Bank Corp., 494 U.S. 472, 476 (1990). Requiring legislative repeal and enactment of new statutes in mooting a claim is a much higher bar than the "promise and a handshake" that the Eleventh Circuit got from the FDC.

158. It also weakens the structure of the Constitution. When courts give deference to executive agencies instead of holding their feet to the fire, it erodes the separation of powers. *See* Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 124 (2015) (Thomas, J., concurring) ("Because the agency is

defendants to manipulate jurisdiction, the door is left wide open for agencies to re-enact unconstitutional policies. At that point, a plaintiff would have to reinitiate a claim and wait for it to make its way through the legal system all over again. As is the case with Keohane, this time gap could have catastrophic consequences.[159]

Further, lowering the bar for a government defendant is diametrically opposed to government defendants' unique features that make their use of voluntary cessation more dangerous than private defendants. Government defendants are as self-interested as any other defendant,[160] and their position as "repeat litigators" makes them more adept at curating precedent.[161] Additionally, the fact that many government defendants enjoy sovereign immunity[162] makes it is easier for them to moot a claim (as compared to a private defendant who can be sued for monetary damages in connection with or separate from a challenged policy, which will prevent them from mooting a claim).[163] Lastly, the political nature of government defendants means that they can never fully guarantee that a challenged policy is incapable of repetition. Indeed, "[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute."[164] This same truth applies to the state legislatures and to administrative agencies.[165] This means, even assuming the best—that a government defendant is genuine in their commitment to a change in policy—the commitment is only good as long as that specific representative is in power.[166] An election or change in agency leadership could arbitrarily abandon that commitment as soon as power is transferred.

The political concerns surrounding a government defendant mooting a claim are not purely theoretical—they have played out in real

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thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.").

159. A delay in hormone therapy led Keohane to "attempt suicide twice in three days." *Keohane*, 952 F.3d at 1284.

160. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("[Congress] realized that state officers might, in fact, be antipathetic to the vindication of [constitutional] rights.").

161. Precisely what the voluntary cessation exception seeks to prevent. *See* E.I. Dupont de Nemours & Co. v. Invista B.V., 473 F.3d 44, 47 (2d Cir. 2006) ("[T]hat doctrine aims to eliminate the incentive for a defendant to strategically alter its conduct in order to prevent or undo a ruling adverse to its interest.").

162. *See, e.g.*, Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) ("[M]onetary relief is severely circumscribed by the terms of the Prisoner Litigation Reform Act.").

163. *See* Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Hum. Res., 532 U.S. 598, 608–09 (2001) ("[S]o long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case.").

164. Dorsey v. United States, 567 U.S. 260, 274 (2012).

165. *See, e.g.*, Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).

166. Executive, agency head, specific legislative body, etc.

life. In 2009, the ACLU sued the federal government over a grant that was given to a religious organization (primarily on the grounds that the organization unconstitutionally barred those funds from being used for abortion and contraceptive services).[167] Eventually the case made its way to the First Circuit Court of Appeals, where it was held to be moot on the grounds that the organization had changed its leadership and policy.[168] The policy, however, was reinstated by the organization again after a turnover in leadership. The ACLU then recommenced litigation almost seven years later regarding the same issue.[169] Similar examples occur almost annually after state elections when newly elected officials replace former members. Former position holders' commitments and policy stances are often completely reversed by the new occupant within months of the election.[170] This flip-flopping in policy and legal positions is especially visible in issues affecting the transgender community. For example, whether transgender persons are allowed to serve in the military has changed three times in the past four years.[171] Since no government actor can guarantee their successors will not fall back on previous policies, the challenged policy is always capable of repetition. This is precisely why government defendants should be held to the same high standard as private defendants.

This case presents a perfect opportunity for the Supreme Court to correct the lower courts and explicitly state that a lower standard should not be afforded to government defendants in voluntary cessation cases.[172] If a challenged policy is repealed after the commencement of a

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167. ACLU of Mass. v. Sebelius, 821 F.2d 474 (D. Mass. 2012).

168. ACLU of Mass. v. U.S. Conf. of Cath. Bishops, 705 F.3d 44, 56 (1st Cir. 2013) (giving weight "to the fact that the defendants are high-ranking federal officials, including a cabinet member, who have, as a matter of policy, abandoned the prior practice and adopted a concededly constitutional replacement").

169. ACLU of N. Cal. v. Azar, No. 16-CV-03539-LB, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018).

170*. See, e.g.*, Nick Manes, *AG Pulls Michigan from ExxonMobil Suit*, MICHIGANADVANCE (Feb. 07, 2019), https://www.michiganadvance.com/blog/ag-pulls-michigan-from-exxonmobil-suit/ (citing that the new Attorney General has withdrawn from twenty-seven federal lawsuits that her predecessor had joined within forty-five days of taking office).

171. Jacqueline Feldscher & Lara Seligman, *Biden Repeals Trump-Era Ban on Transgender Military Service*, POLITICO (Jan. 25, 2021, 02:25 PM EST), https://www.politico.com/news/2021/01/25/biden-repeals-transgender-military-service-ban-462186 (chronicling the changes from President Obama's executive order that took effect in July 2017, to President Trump's order reversing that policy in April 2019, to now President Biden's reinstatement of the policy in January 2021).

172. Some were hopeful that *New York State Rifle & Pistol Ass'n., Inc. v. City of New York*, 140 S. Ct. 1525 (2020) would be that case, but the Court failed to elaborate on the issue in its opinion. *See* Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J.F. 325, 342 (2019) ("[T]he Supreme Court now has the opportunity to set the record straight and confirm that government defendants are subject to the same voluntary-cessation standard as everyone else.").

claim, the courts should apply a uniformly high standard to both public and private defendants. To do otherwise allows for the abuse of the legal system by governmental actors and risks too much.[173]

B. On the Issue of Deliberate Indifference

At first glance, the *Keohane* opinion seems to contain an excessive amount of legal analysis to decide the simple issue of whether an inmate should be allowed to grow out their hair or wear a specific pair of underwear.[174] However, this view misses the bigger picture. The *Keohane* decision represents the legal structure that any future transgender inmate will come up against (whether that be a request for gender confirmation surgery or even hormone treatment, should the FDC fall back on its former "freeze frame" policy). This is why it is crucial that the opinion be examined and critiqued for its flaws. The mistakes in *Keohane* will continue to have an adverse effect on transgender inmates unless they are corrected.

1. Specific Analysis of the Opinion: The Majority Makes Up a Standard of Review, Then Instructs Us That 'There's Nothing to See Here'

In order for the majority to vacate the injunction ordering the FDC to provide Keohane with social transitioning, it had to first get its foot in the door. It did this via an incoherent and unprecedented standard of review. Since both the majority and the dissent derive what they believe is the correct standard of review from *Thomas v. Bryant*, it seems logical to start the analysis there .[175]

In *Thomas*, the Eleventh Circuit Court of Appeals reviewed a district court's issuance of a permanent injunction against the use of chemical

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173. *See generally* Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Neither Party Respecting Mootness, *New York State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280) (arguing that because the actions of a government defendant have broad ramifications for the general public, it is even more important to hold them to a higher standard). "Experience, however, proves that the depositories of power who are mere delegates of the people, that is of a majority, are quite as ready (when they think they can count on popular support) as any organs of oligarchy to assume arbitrary power, and encroach unduly on the liberty of private life." Richard M. Ebeling, *John Stuart Mills and the Dangers of Unrestrained Government*, FUTURE OF FREEDOM FOUND. (Aug. 13, 2015), https://www.fff.org/explore-freedom/article/john-stuart-mill-dangers-unrestrained-government/ (quoting John Stuart Mills).

174. The district court puts it more bluntly. *See* Keohane v. Jones, 328 F. Supp. 3d 1288, 1295 (N.D. Fla. 2018) ("To be clear, Ms. Keohane is not requesting permission to wear stiletto heels or costume jewelry while in Defendant's custody. Instead, she's only ever sought to be treated like any other female inmate in this state.").

175. *See* Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1272, 1288 (11th Cir. 2020) (citing 614 F.3d 1288 (11th Cir. 2010)).

agents on inmates, on the basis that it violated the inmates' Eighth Amendment rights.[176] After recognizing that an Eighth Amendment claim involved both an objective and subjective prong, the court began its review.[177] The court first found that the objective prong is a question of law reviewed de novo.[178] Next, the subjective prong, which is based on factual findings, was reviewed for clear error.[179] Finally, the *Thomas* court reviewed the ultimate finding that an Eighth Amendment violation had occurred, by noting that both the subjective and objective prongs were met.[180]

That final review was simple and limited, taking up only a single line of text in the opinion. The scope of the review was limited to confirming that an Eighth Amendment violation occurred (based on the previous review of the two prongs already having been completed). The *Keohane* majority refers to this as "mindless, mechanical box checking" and claims that the final review of Eighth Amendment claims gives the court the power to conduct a de novo review of both prongs and reach its own independent conclusion on the merits.[181]

To see how illogical the newly minted *Keohane* standard of review is, it is beneficial to view exactly how it would play out. First, a court would go through the effort of reviewing both the objective prong de novo and the subjective prong for clear error. Having reached conclusions on both prongs, the court would then go back and review the claim as a whole, regardless of its original findings on the two prongs. A court could thus find that no Eighth Amendment violation occurred

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176. 614 F.3d at 1294.

177. *See id.* at 1304.

178. *Id.* at 1307.

179. *See id*. at 1312–16 ("In sum, we cannot conclude that the district court was clearly erroneous in finding that the record demonstrates that '[the defendant] turned a blind eye' to [plaintiff's] mental health needs and the obvious danger that the use of chemical agents presented to his psychological well-being.") (internal citations omitted). Because the trial court reviews the entirety of the evidence (including oral testimony and depositions) it is seen to be in better position to decide questions of fact. *See* Salve v. Regina, 499 U.S. 225, 233 (1991) (stating that deference should be given to "the unchallenged superiority of the district court's factfinding ability"); *see also* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

180. *See Thomas*, 614 F.3d at 1317 ("Concluding that [the plaintiff] satisfied both the objective and subjective prongs of his [Eighth Amendment claim], we affirm the district court's declaratory judgement.").

181. Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1273 n.8 (11th Cir. 2020). The majority comes to this conclusion after placing themselves in the shoes of the *Thomas* court, stating that limited review "cannot possibly be what we've meant." *Id.* Covering all bases, the majority then comments that, even if they were wrong and were beholden to a clear error review, they would still come to the same conclusion. *Id.* This claim is made rather cheekily with no reference to which specific facts they would find clearly erroneous. *Id.*

even if the objective prong was met, and no clear error was made regarding the subjective prong being met (or at least without having to cite to any clear error). To put it bluntly, the standard allows the court to come to whatever conclusion it wants regardless of its review of the two prongs.[182] In the *Keohane* dissent Judge Wilson asks, "What is the point of initial clear error review for [the subjective prong] if we review that finding again de novo when we review the ultimate Eighth Amendment violation?"[183] The majority never answers this question.

The *Keohane* opinion clearly demonstrates a departure from prior precedent. Had it followed *Thomas*, the court would not have been free to vacate the district court's injunction because the majority conceded the objective prong and did not point to any clearly erroneous findings regarding the subjective prong. The majority usurped the fact-finding role of the trial court, and Keohane paid the price.

2. Specific Analysis of the Opinion: Even After Usurping the Role of the Trial Court, the Majority Gets it Wrong on the Merits

The opinion held that the treatment Keohane was receiving from the FDC "passes constitutional muster." The majority felt that the denial to accommodate social transitioning boiled down to a disagreement between medical professionals; regardless, the FDC's security concerns trumped all others. The opinion is wrong on both accounts. The FDC's treatment team was not qualified to give a medical opinion warranting the weight that the majority gave it, and the security concerns were mere pretense.

The opinion is right to state that a difference in medical opinion regarding a treatment plan does not support an Eighth Amendment violation.[184] However, this premise presupposes that both opinions are based on "sound professional judgment."[185] The treatment plan provided by the FDC does not rise to that level. To start, the plan was derived by a medical team that had no experience in treating a patient with gender dysphoria (pre-transition).[186] Yet, their medical opinion was held on par with the experts trained and experienced in the WPATH

182. The dissent refers to this as "super-de-novo." *Id.* at 1290 (Wilson, J., dissenting).
183. *Id.* at 1288 n.11.
184. *See* Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989).
185. *See id.* ("[W]e disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment.") (internal citations omitted).
186. *See Keohane*, 952 F.3d at 1295–96 (Wilson, J., dissenting) ("[N]o member of Keohane's treatment team had ever treated a pre-transition patient with gender dysphoria. In fact, most of her team members had never treated a patient with gender dysphoria, period.").

Standards of Care. Even worse, the FDC's Chief Medical Officer (representing the ultimate medical opinion as far as Keohane's treatment goes per FDC structure) does not believe that gender dysphoria exists.[187] He freely admitted that he "doesn't know one way or the other if social transitioning is helpful in treating gender dysphoria."[188] According to the opinion, this level of medical expertise is what the Constitution demands. Deliberate indifference can be established when an inmate's medical care is deemed inadequate or when it is administered by medical personnel incapable of evaluating the need for treatment.[189] It is hard to see how the treatment offered by the FDC does not meet both these standards.

Further deteriorating the majority's framing of this case as one involving dueling medical opinions is the fact that the FDC's medical opinion was not even based on medical science. During the trial, members of the FDC's medical team explained that they never considered social transitioning as a treatment because they knew it was against prison policy.[190] Those that did consider it never followed through because they knew it would be shot down by the administration.[191] Having a blanket ban on treatment that is based on administrative policy rather than medical judgment constitutes deliberate indifference.[192] The record seems to make clear that the denial of Keohane's social transitioning request was based on prison policy and not an individualized medical judgment. In fact, the opinion only briefly attempts to refute this contention in a footnote. The majority matter-of-factly states that it cannot be a blanket ban because the FDC now says it would allow it if it were "deemed medically necessary."[193] Note that this offer came after the start of litigation (and has not been granted to anyone) and seems more like the FDC is saying 'of course we'll do it if the court forces us to.' That simply cannot be enough to conclude that the denial of social transitioning was not the result of a blanket

187. *See* Keohane v. Jones, 328 F. Supp. 3d 1288, 1306 (N.D. Fla. 2018) (commenting that the WPATH Standards are the "only process [he's] aware of where we go against nature to help somebody").

188. *Keohane*, 952 F.3d at 1296.

189. *See* Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985).

190. *See, e.g.*, *Jones*, 328 F. Supp. 3d at 1308 ("Ms. Baute has never assessed whether Ms. Keohane has a mental-health need for longer hair or access to female undergarments because, she says, [FDC] policies prohibit these things.").

191. *See, e.g.*, *id.* ("[T]he team did discuss whether Ms. Keohane should have access to female clothing. But they concluded 'it is out of our hands, that we understand, but there's nothing we can do,' because [the FDC] makes that decision.").

192. Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).

193. *Keohane*, 952 F.3d at 1275 n.11.

administrative ban (let alone to overrule a judge who made that determination after weighing all the evidence[194]).

In what appears to be a last-ditch effort, the opinion offered up security concerns as a justification for the denial of treatment. However, these concerns were only pretext offered by the FDC to cover for its policy and were nonsensical on their face.[195]

3. Security was Just a Red Herring

The court found that an outright denial of care could be justified if it was based on safety or security issues.[196] The court cited to caselaw and offered up quotations that at first glance seemed to support this contention. However, a closer look revealed that the linchpin for a security or safety concern overriding a constitutional violation in those cases was that the security or safety concern must first be legitimate.[197] In *Keohane*, framing the FDC's security and safety claims into the "legitimate" category is like trying to fit a square peg into a round hole.[198]

When reading the depositions of the defendant's expert witnesses laying out the security concerns posed by Keohane's requested social transitioning, one may question their earnestness. That does not seem to be a concern shared by the court. The Eleventh Circuit afforded the defense witnesses' testimony weight as justification for denying a prison inmate medical treatment.[199] It takes very little time after reading what these security concerns are to determine that they are nothing more than a pretense to continue denying a request that the FDC does not want to approve.

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194. *See Jones*, 328 F. Supp. 3d at 1318 ("[Policies] governing clothing and grooming trumped the exercise of medical judgement.").

195. *See infra* pt. IV(B)(3) (discussing the validity of the FDC's security claims).

196. *Keohane*, 952 F.3d at 1275.

197. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 561 (1979) ("[W]e think that these particular restrictions and practices were reasonable responses by MCC officials to *legitimate* security concerns.") (emphasis added); *see also, e.g.*, Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014) ("[D]enial of care may not amount to an Eighth Amendment violation if that decision is based in *legitimate* concerns regarding prisoner safety and institutional security.") (emphasis added).

198. The Arkansas Department of Corrections made similar security justifications (claiming that long hair could be used to hide weapons, drugs, and other contraband) before the Supreme Court for denying a Muslim inmate the right to grow a beard. *See* Holt v. Hobbs, 574 U.S. 352 (2015). In the opinion that held that the department's beard restriction violated the inmate's religious freedoms, Justice Alito quipped that the justification of security was "hard to take seriously." *Id.* at 363.

199. *See Keohane*, 952 F.3d at 1277 (agreeing with the FDC that "it ha[d] rationally concluded that [Keohane's] social-transitioning requests—to dress and groom herself as a woman—would present significant security concerns in an all-male prison").

The security concerns can be broken up into two categories: concerns for prison staff and concerns for Keohane herself.[200] As to the prison staff, the FDC's expert witness stated that one of the main security threats that the growth of long hair in prison poses is that it can be "utilized to conceal smaller items of weaponry, drugs and escape paraphernalia."[201] At first glance, this may sound rational, but a minimal amount of examination exposes the massive holes in this justification. First is the fact that the growth of long hair is not prohibited in female prisons in Florida.[202] If one were to accept that long hair really did pose a significant security threat, one would assume that it would be prohibited in all Florida prisons. But this is not the case. The opinion makes no attempt to square this gap in logic.[203] Secondly, the testimony of the FDC's Chief of Security Operations contradicts the FDC's claims:

> Q. Do officials ever find weapons or other contraband in female inmate's hair?
>
> A. Not that I'm aware of.
>
> Q. Do female inmates ever escape?
>
> A. Not that I'm aware of.[204]

Additionally, neither the defendant's nor the plaintiff's expert witnesses can cite to any actual occurrences where long hair was used to conceal a weapon, drugs, or escape paraphernalia.[205]

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200. Note that the opinion does not delve into the specific security concerns or examine them with any greater scrutiny other than stating matter-of-factly that they exist because the FDC says they exist. *See id.* at 1275 ("[T]hey presented serious security concerns—including, most obviously, that an inmate dressed and groomed as a female would inevitably become a target for abuse."). To get a more direct explanation of what the actual security concerns are, one must look to the report of James Upchurch. Report of James R. Upchurch, Keohane v. Jones, 328 F. Supp. 3d 1288 (N.D. Fla. 2018) (No. 4:16-CV-511).

201. Report of James R. Upchurch, *supra* note 200, at 5.

202. FLA. ADMIN. CODE r. 33-602-101(2), 101(4) (2020) (stating that the only prohibition on length of hair applies to male inmates).

203. Following the FDC's security justifications, one would expect to walk into a women's prison and find complete carnage (women stabbing each other from knives pulled from their hair, women tunneling out under the walls of the prison with escape paraphernalia they kept in their hair, etc.).

204. Deposition of Carl Wesley Kirkland, Jr. at 30:9–13, *Jones*, 328 F. Supp. 3d 1288 (No. 4:16-CV-511).

205. Keohane's expert explicitly states that in his thirty years of prison management that included "searching thousands of inmates, never once did I find contraband in anyone's hair." Report of Richard J. Subia at 3, 7, *Jones*, 328 F. Supp. 3d 1288 (No. 4:16-CV-511). The report of the defense's expert witness also failed to cite any specific instance. *See* Report of James R. Upchurch, *supra* note 200.

The other security claim made by the FDC (and echoed by the court) was that allowing Keohane to socially transition (wearing of long hair and female undergarments) would make her a target for abuse. On the surface, this is akin to blaming a rape victim for wearing provocative clothing. This argument also ignores the elephant in the room that Keohane is undergoing hormone treatment (authorized by the FDC), which among other things, leads to the development of breasts.[206] So in theory, it is the position of the FDC that Keohane's security is not at risk based on her having developed feminine breasts in a male prison, but rather based on her wearing a bra, panties, and long hair in combination with those breasts. This is another break in logic for the FDC and majority.

It is 2022, advancements in knowledge and technology make it possible to overcome "security issues" when circumstances demand. The Federal Bureau of Prisons and other states have figured it out and do not restrict hair length for inmates.[207] The FDC itself even stipulated that if ordered to do so it would be capable of enacting appropriate security measures to ensure everyone's safety while Keohane socially transitioned.[208]

The only reason a court would accept this security justification is if it supported the ultimate conclusion that the court wanted to reach. The Eleventh Circuit's rubber stamping of the FDC's "security concerns" sets a dangerous precedent. It sends the message that any legitimate claim can be defeated if a justification of "security" is invoked, even if that justification is flimsy and illogical.

4. The WPATH Standards Should Have Won the Day . . . And it Should Not Have Been Close

One of the major sources of tension in *Keohane* was the dueling medical opinions delivered by each side. On the FDC's side was a medical

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206. *See Feminizing Hormone Therapy*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096 (last visited Feb. 21, 2022) ("Breast development. This will begin three to six months after treatment. The maximum effect will occur within two to three years.").

207. *See* 28 C.F.R. § 551.4(a) (2020) ("The Warden may not restrict hair length if the inmate keeps it neat and clean."); *see also* CAL. CODE REGS. tit. 15 § 3062(e) (2020) ("An inmate's hair or facial hair may be any length.").

208. *Jones*, 328 F. Supp. 3d at 1317–18 ("[I]f having longer hair or female undergarments or makeup were deemed to be medically necessary for an inmate with gender dysphoria, then the accommodation would be provided, with additional security measures taken *if necessary*.") (emphasis added).

team that had little to no experience treating gender dysphoria,[209] a medical director that expressed doubts that gender dysphoria was even real,[210] and a treatment plan that was guided by administrative protocol rather than medical science.[211] On the other side you had the WPATH Standards of Care, which are recognized and viewed as authoritative by major American medical associations,[212] various state Medicaid programs,[213] major insurance providers,[214] the Federal Bureau of Prisons (BOP),[215] the United States Tax Court,[216] and other Federal Appeals Courts.[217]

The opinion characterizes this as nothing more than a simple disagreement between "medical professionals" (impliedly of equal credibility) over the proper course of treatment for Keohane's gender dysphoria.[218] The majority portrays the difference as akin to the differing opinions of Barry Bonds and Hank Aaron on how to hit homeruns. In reality, it represents the difference between the advice of Barry Bonds and a little leaguer.[219]

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209. *Id.* at 1309.

210. *Id.* at 1306.

211. *Id.* at 1315 ("[FDC's] contracted medical providers understand [FDC's] security policies effectively ban social transitioning in prison without exception.").

212. Such associations include, but are not limited to, the American Medical Association, the American Psychiatric Association, the American Psychological Association, and the American College of Obstetricians and Gynecologists. *See id.* at 1294.

213. *See, e.g.*, DIV. OF HEALTH CARE FIN. & POL'Y, MEDICAID SERVICES MANUAL § 607(E)(1)(C), AT 3 (2018), https://dhcfp.nv.gov/uploadedFiles/dhcfpnvgov/content/Resources/AdminSupport/Manuals/MSM/C600/MSM_600_18_01_01.pdf ("The recipient must have . . . comprehensive mental health evaluation provided in accordance with Version 7 of the WPATH SOC. . . .").

214. *See, e.g.*, *Clinical Policy Bulletin No. 0615 – Gender Affirming Surgery*, AETNA, http://www.aetna.com/cpb/medical/data/600_699/0615.html (last updated Nov. 20, 2020) ("Aetna considers gonadotropin-releasing hormone medically necessary to suppress puberty in trans identified adolescents if they meet World Professional Association for Transgender Health (WPATH) criteria.").

215. *See Medical Management of Transgender Inmates*, BOP, 10 (Dec. 2016), https://www.bop.gov/resources/pdfs/trans_guide_dec_2016.pdf ("For further considerations, please refer to the most recent guidelines from the World Professional Association on Transgender Health (WPATH). . . .").

216. *See* O'Donnabhain v. Comm'r, 134 T.C. 34, 37, 70 (2010) (basing the determination of whether a treatment was medically necessary or cosmetic, in part, on the WPATH Standards of Care).

217. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 787 (9th Cir. 2019) (referring to the WPATH Standards as "the undisputed starting point in determining the appropriate treatment for gender dysphoric individuals").

The list of entities recognizing the WPATH standards goes on, including the American Medical Student Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, and the American College of Surgeons. *Id.* at 795.

218. Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1300 (11th Cir. 2020).

219. If the names in the analogy are not recognizable or are too dated, Barry Bonds and Hank Aaron were professional baseball players (respectively number one and number two on the all-time home run list for Major League Baseball).

In existence for over forty years, the WPATH and its Standards of Care reflect "evidence-based clinical practice and scientific research."[220] The standards are representative of "the consensus of the medical and mental health community regarding the appropriate treatment for gender dysphoria."[221] Both these facts demonstrate that the WPATH Standards of Care are precisely what transgender inmates are entitled to receive.[222] Additionally, the WPATH Standards are not beholden to the same administrative and budgetary restraints that often encumber prison medical professionals when they are determining a course of treatment.[223]

Obviously, the courts cannot dictate to prison administrators what medical policy to follow, but they can shape jurisprudence in a way that influences and steers that policy. In adjudicating medical claims by transgender inmates, courts should automatically find deliberate indifference if the inmate was not evaluated and offered a treatment plan consistent with the WPATH Standards of Care (thus recognizing that these standards represent the "floor" for transgender inmate care).[224]

5. Edmo v. Corizon*, the Ninth Circuit Weighs In*

In *Edmo*, the Ninth Circuit held that when prison officials deny medically necessary treatment to a transgender inmate (Adree Edmo), the Eighth Amendment is violated.[225] Accordingly, the court affirmed a district court's injunction ordering the Idaho Department of Corrections (IDC) to provide Edmo with gender confirmation surgery.[226] Granted, the fact pattern in *Edmo* is not identical to *Keohane* (the medical

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220*. Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WPATH (Dec. 21, 2016), https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf.

221. Brief of the American Medical Association et al. as Amici Curiae in Support of the Employees at 14, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

222*. See* Fernandez v. United States, 941 F.2d 1488, 1493 (11th Cir. 1991) ("An inmate's entitlement to medical treatment reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards is undisputed.") (internal citation omitted).

223. Jason Szep et al., *U.S. Jails are Outsourcing Medical Care—and the Death Toll Is Rising*, REUTERS (Oct. 26, 2020, 11:00 AM GMT), https://www.reuters.com/investigates/special-report/usa-jails-privatization/ ("At orientation . . . [a nurse] testified, Corizon regional medical director Scott Kennedy told her, 'It costs too much money to send people out.' She added, 'They would ask me not to prescribe medications that I felt like were necessary.'").

224. A recognition that the Federal Bureau of Prisons and Ninth Circuit have already made. *See* Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1295–96 (11th Cir. 2020); Edmo v. Corizon, Inc., 935 F.3d 757, 787 (9th Cir. 2019).

225*. Edmo*, 935 F.3d at 767.

226*. Id.*

treatment requested by the inmate was different but both, at their core, centered around medical treatment for transgender inmates). However, there are specific holdings within *Edmo* that directly conflict with those of the Eleventh Circuit.

The biggest disagreement between the two circuits is premised upon what precisely qualifies as a "medical opinion." Both agree that a difference in medical opinion is insufficient to establish a claim of deliberate indifference.[227] The Ninth Circuit, however, does not feel the need to "defer to the judgment of prison doctors or administrators."[228] It requires that the decision of the prison authorities be "medically acceptable" in order to qualify as a dueling medical opinion.[229] Medical acceptability for the treatment of inmates with gender dysphoria requires consultation with and adherence to the WPATH Standards of Care.[230] The Ninth Circuit also found that a lack of direct experience in treating gender dysphoria further lessens the chance of a medical professional's opinion being found to be medically acceptable.[231] Contrast this with *Keohane*'s holding that a "difference in medical opinion" can be established even when one side is completely unfamiliar with the WPATH Standards of Care, and no testifying medical professional for that side has any real experience with treating gender dysphoria.[232] In weighing very similar fact patterns, the Ninth and Eleventh Circuits reached drastically different conclusions,[233] with each conclusion yielding drastically different results.[234]

The other disagreement between the circuits concerned the standard of review and how that standard is applied. Again, both circuits agreed that a lower court's holding regarding the subjective prong was to be reviewed for clear error, and its overall determination of an Eighth Amendment violation reviewed de novo. The disagreement is over how

227. *See Edmo*, 935 F.3d at 786; *see also Keohane*, 952 F.3d at 1273.

228. *Edmo*, 935 F.3d at 786 (internal citations omitted).

229. *Id.*

230. *See id.* at 787 (discrediting the medical opinion of the IDC's physicians and medical experts because "[t]hose individuals lacked expertise and incredibly applied (or did not apply, in the case of the State's treating physician) the WPATH Standards of Care").

231. *See id.* at 788 ("[T]he more relevant experience for determining the medical necessity of [treatment] is having treated individuals with gender dysphoria . . . . Such experience lends itself to fundamental knowledge of whether [treatment] is necessary.").

232. *Keohane*, 952 F.3d at 1295–96.

233. *Compare Edmo*, 935 F.3d at 797 (finding that treatment provided by medical professionals who did not follow WPATH Standards and who lacked experience in treating gender dysphoria to be "medically unacceptable" and a violation of the Eighth Amendment), *with Keohane*, 952 F.3d at 1278 n.15 (finding almost identical treatment to be "minimally competent" and not a violation of the Eighth Amendment).

234. Edmo won the right to receive her gender affirming surgery while Keohane was denied social transitioning. *Keohane*, 952 F.3d at 1279; *Edmo*, 935 F.3d at 803.

those two reviews are carried out. In *Edmo*, the opinion makes clear that the factual findings are analyzed "with deference to the district court."[235] This means that the lower court's determination regarding both the medical necessity of a requested treatment and the deliberate indifference on the part of the department of corrections to those needs are reviewed for clear error.[236] The de novo review the Ninth Circuit then employed simply determined if "implications of the factual findings" supported an Eighth Amendment violation.[237] This requires ensuring that the lower court's findings (which were first reviewed for clear error) covered every legal facet that an Eighth Amendment violation requires.[238] For example, if the lower court found that a serious medical need was established and that a certain treatment was necessary, but failed to find that prison officials were aware of the prisoner's medical needs, then the de novo review would catch this and the court would hold that an Eighth Amendment violation had not occurred.[239] The dissent in *Keohane* stated that this was exactly the way it is supposed to go (and the way it has always gone according to Eleventh Circuit precedent).[240] The *Keohane* opinion, on the other hand, does not do this. Instead, the opinion holds that the de novo review of the ultimate Eighth Amendment violation allows the court to go back and reverse the district court's findings on medical necessity and deliberate indifference without pointing to any clear error.[241] The majority never explicitly states this, but that is the result.[242] The *Keohane* majority found that socially transitioning was not medically necessary.

235. *Edmo*, 935 F.3d at 767.

236. *See, e.g.*, *id.* at 786 (affirming the district court's finding that gender confirmation surgery was medically necessary because the "conclusion derives from the district court's factual findings, which are not illogical, implausible, or without support in inferences that may be drawn from the facts in the record") (internal citations omitted).

237. *Id.* at 767.

238. *See id.* ("The record before us, *as construed by the district court*, establishes that Edmo has a serious medical need, that the appropriate medical treatment is GCS, and that prison authorities have not provided that treatment despite full knowledge of Edmo's . . . medical needs.") (emphasis added).

239. *See id.* at 786.

240. Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1300 (11th Cir. 2020) (Wilson, J., dissenting) ("The Ninth Circuit [in *Edmo*] got it right, and its analysis leads us to the right result here.").

241. Keohane v. Fla. Dep't of Corr. Sec'y, 981 F.3d 994, 1010–11 (11th Cir. 2020) (en banc denial) (Rosenbaum, J., dissenting) ("In fact, except in a footnote dismissing the notion that clear-error review applies to [the subjective prong], the majority opinion never once employed the term 'clear error' in conducting its analysis.").

242. *Id.* at 1011 (Rosenbaum, J., dissenting) ("Rather than explaining how *Keohane*'s holding can possibly be consistent with [precedent], the . . . Opinion takes a different tack: it appears to attempt to distract the reader from its inability to demonstrate that *Keohane* does not violate [precedenct].").

It did so with no reference to any clear error being committed by the district court. The opinion also found that the FDC's security concerns are sufficient to justify the denial of socially transitioning, even though the district court found that they were merely pretextual.[243] Again, there is no mention of what clear error the court found. While the Ninth Circuit felt bound by the decision of the district court (save a finding of clear error), the Eleventh Circuit felt free to reverse the decision of the district court merely because it disagreed.

This split between the two circuits on major issues of law highlights the need for the Supreme Court to grant certiorari at the next opportune case.[244] The results of serious Eighth Amendment violation claims should not be dependent on what circuit the inmate happens to be incarcerated in. These issues are too important, and the repercussions are too serious not to have a universal, coherent, and consistent precedent for the courts to follow.

V. CONCLUSION

The words of the Ninth Circuit should represent a way forward for courts in the arena of transgender prison rights:

> We apply the dictates of the Eighth Amendment today in an area of increased social awareness: transgender health care. We are not the first to speak on the subject, nor will we be the last. Our court and others have been considering Eighth Amendment claims brought by transgender prisoners for decades. During that time, the medical community's understanding of what treatments are safe and medically necessary to treat gender dysphoria has changed as more information becomes available, research is undertaken, and experience is gained. The Eighth-Amendment inquiry takes account of that developing understanding.[245]

243. The motivation is unclear, but the majority felt the need to erroneously claim that the district court "declined even to address the security issue." *Keohane*, 952 F.3d at 1276 n.13. The district court absolutely addressed the issue, it just ultimately found it unpersuasive. *See Keohane v. Jones*, 328 F. Supp. 3d 1288, 1318 (N.D. Fla. 2018) (confirming that the court had heard from multiple expert witnesses testifying to "myriad security concerns.").

244. *See* SUP. CT. R. 10(a) (listing the instance of when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," as an indication of a sound reason that the Court should grant certiorari).

245. Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019).

Despite the setback that *Keohane* represents,[246] there is room for optimism. Optimism that the view of the Ninth Circuit will become the consensus. Optimism that the issues raised in this critique will see some form of resolution.

When a person is incarcerated, they lose their freedom and ability to adequately care for themselves. At the very least, society has the obligation to provide those inmates with adequate medical care.[247] This is America. Society must remain steadfast in demanding that the evolving standards of decency continue to evolve. This requires people to remain informed and active in advocacy. "Justice will not be served until those who are unaffected are as outraged as those who are."[248]

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246. The Supreme Court denied certiorari on October 21, 2021. Keohane v. Inch, 142 S. Ct. 81 (2021).

247. "[T]he treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it." Sir Winston Churchill, House of Commons Debate (July 20, 1910) (transcript at https://api.parliament.uk/historic-hansard/commons/1910/jul/20/class-iii).

248. Cory Booker (@CoryBooker), TWITTER (Dec. 02, 2020, 8:02 AM), https://twitter.com/corybooker/status/1334120760034660354?lang=en.